

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SARA CALL

Claimant

VS.

LOWEN CORPORATION

Respondent

AND

TRAVELERS INSURANCE CO.

Insurance Carrier

Docket No. **248,135**

ORDER

Claimant requests review of a preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated December 6, 2000.

ISSUES

Whether the claimant met with personal injury by accident arising out of and in the course of her employment with the respondent. The respondent additionally raises the issue of whether the claimant gave timely notice of her alleged accident as required by K.S.A. 44-520.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant alleges that she was exposed to fumes at work which either caused or aggravated her asthma condition. The claimant testified that she had worked for respondent for a few years without any respiratory problems. She left work for respondent for a few weeks and upon her return to work on the night shift she began to experience headaches, sinus dryness and shortness of breath.

The claimant attributed her problems to working in an enclosed building which she stated had no fans. Conversely, the respondent's human resource specialist testified that the building where the claimant worked had exhaust fans to eliminate fumes as well as an air intake system that circulates fresh air from the outside.

The claimant testified that she advised her supervisor that she was getting bad headaches and having a hard time breathing because of her exposure to fumes. The claimant was provided a work release note dated July 23, 1999, from her family physician. The note indicated that claimant appeared to have reactive airway disease exacerbated by paint fumes and recommended that claimant not be around irritant fumes which exacerbate her respiratory problems. The claimant presented the note to her supervisor and told him she would not be able to return to work because of the fumes.

It should be noted that claimant's personnel file indicates that she terminated her employment on July 21, 1999, which predates the signed release from Dr. Nazir. Respondent's personnel specialist testified that claimant's immediate supervisor had e-mailed the personnel office that claimant had to quit due to a previous lung condition.

As the claimant notes, the dispositive issue is whether or not the claimant has met her burden of proof that her asthma was aggravated or caused by exposure to chemicals at work.

At the preliminary hearing in this case, the claimant proffered causation evidence in the form of medical record exhibits. As previously noted, Dr. Nazir indicated that the claimant appeared to have a reactive airway disease exacerbated by paint fumes. In addition, the claimant had a consultation with Dr. Frazier. The doctor concluded that the clinical picture is consistent with reactive airways disease related to intensive solvent exposure. Although the claimant testified that she had quit smoking for two years, Dr. Frazier's notes indicate that the claimant smokes one or two cigarettes a day.

Conversely, the respondent proffered an evaluation report from Dr. Kerby, a professor at the Division of Pulmonary Diseases and Critical Care Medicine at the University of Kansas Medical Center, which denoted claimant had a fairly typical history of asthma with onset in childhood, remission for a time with recurrence in adult life. The report concluded that the solvent exposures associated with employment transiently caused increased asthma symptoms but neither caused the asthma nor materially affected its course.

The Administrative Law Judge considered the foregoing evidence and concluded the claimant would be referred to a pulmonologist for an independent medical examination to decide the issue of whether the claimant's complaints are causally related to fumes and chemicals at her workplace. The parties agreed to a referral to Dr. Daniel Doornbos.

Dr. Doornbos, in his letter dated October 20, 2000, stated that his preliminary

consultation notes had unfortunately been sent out in an incomplete form without his signature. He further commented that looking at those notes would be confusing since they did not answer most of the questions that had been addressed to him. The doctor then addressed the specific issue of whether or not the claimant's condition was caused or aggravated by exposure to fumes at work. The doctor noted:

“. . . it is at least plausible that some of the patient's worsening of lung function may indeed have been caused by her workplace.”

The preliminary consultation notes that were inadvertently sent out contain printed across the top the following admonition:

“The information contained in this report is preliminary and has not been reviewed. The final signed report may differ and is located in the medical record.”

Nonetheless, the claimant relies upon a portion of the consultation notes which provided:

“Therefore although I cannot conclusively assign blame to her workplace for her asthma, I think it is more probable than not that the workplace played at least some role in exacerbating her asthma, perhaps permanently.”

It is clear that the final report from Dr. Doornbos does not contain the “more probable” language and has been modified to reflect that the issue of causation is “plausible.” Although contemplated by the parties, the doctor's deposition was not taken and there is no indication in the record why the change in language occurred.

As the Administrative Law Judge noted, the final opinion does not meet the statutory burden of proof standard, more probably true than not true, necessary to establish a causal relationship between the claimant's complaints and her work. In addition, there was some conflicting history the claimant provided the various doctors as well as controverted evidence concerning the level of exposure to the various chemicals. It is the Board's determination that based upon the entire evidentiary record compiled to date the claimant has failed to meet her burden of proof to establish that her asthma was caused or aggravated by her work.

As provided by statute, the findings at preliminary hearing are not binding upon a full hearing on the claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated December 6, 2000, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2001.

BOARD MEMBER

Copies to:

Roger A. Reidmiller, Claimant's Attorney
Jeffrey E. King, Respondent's Attorney
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director